IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-867

NORMAN DANSKER, STEVEN HAYMES
and DONALD ORENSTEIN,

Petitioners,

—against—

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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ANNE JOHNSON
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December 16, 1977

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The Petitioners Norman Dansker, Steven Haymes and Donald Orenstein pray that a writ of certiorari issue to review the judgment and opinion entered on October 21st, 1977 by the United States Court of Appeals for the Third Circuit in the proceeding entitled *United States of America, Appellee* v. *Norman Dansker, et al., Defendants-Appellants.*

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the appendix at page 1A.

Jurisdiction

The judgment of the Court of Appeals was entered on October 21st, 1977. A timely petition for rehearing *en banc* was denied on November 16th, 1977 and this petition for certiorari was filed within thirty days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Question Presented

Whether the Circuit Court of Appeals erred in determining that the trial judge's action in refusing to resentence the petitioners was not an abuse of discretion?

Statutory Provision

Rule 35 of the Federal Rules of Criminal Procedure states as follows:

"Rule 35. Correction or Reduction of Sentence

The Court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The Court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law."

Statement of the Case

The Petitioners Norman Dansker, Steven Haymes and Donald Orenstein were indicted, along with four other individual and two corporate defendants in a three-count indictment alleging a conspiracy and two substantive violations of 18 U.S.C. §1952. The question presented arises out of an extremely complex procedural and factual history, the relevant portions of which are set forth herein.

Petitioners were tried before a jury and convicted on March 29th, 1975. The trial court imposed five-year sentences upon the Petitioners on June 5th, 1975. On direct appeal, Petitioners *inter alia* raised claims that the government had withheld exculpatory information in violation of the rule of *Brady* v. *Maryland*, 373 U.S. 83 (1963). The Court of Appeals refrained from deciding the merits of the *Brady* issue and affirmed Petitioners' convictions upon Count Two of the indictment on June 14, 1976. *United States* v. *Dansker, et al.*, 537 F.2d 40 (3rd Cir. 1976), cert. den'd. 429 U.S. 1038 (1977).

In its opinion, however, the Court of Appeals suggested that Petitioners should present their *Brady* claims to the district court in an appropriate Rule 33, F.R.C.P. motion. Post-trial proceedings were thereupon begun and a Rule 33 motion was filed on January 14th, 1977 in which Petitioners sought a new trial, an evidentiary hearing and discovery.* While these motions were pending before the district court, Petitioners filed motions for reduction of sentence pursuant to Rule 35, F.R.C.P. These motions were denied in their entirety by the district court on June 3rd, 1977. Upon appeal from this order, the Court of Appeals, reversing in

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* In addition, Petitioners moved for disqualification of the trial judge.

part, ordered an evidentiary hearing upon an aspect of the *Brady* claim not relevant here, while affirming the district court's ruling in all other respects.

The facts which underlie the question herein presented stem from a revelation which occurred on May 6th, 1977 during oral argument upon Petitioners' Rule 35 motions. In conjunction with their motion for disqualification, Petitioners had moved for discovery concerning all *ex parte* communications between the government and the trial judge. At the May 6th argument, the trial judge made available to petitioners *for the first time* what purported to be a complete transcript of an *ex parte* meeting held on March 22nd, 1975—while the trial was in progress—between the government and the court. Unbeknownst to either Petitioners or their counsel, at that meeting the government attributed acts of criminal misconduct to the Petitioners which were unrelated to the crimes charged in the indictment. These unsupported allegations included bribery, blackmail, intimidation of witnesses and subornation of perjury. (A. 774 et seq.).*

* The letter "A" refers to petitioners' joint Appendix filed in the United States Court of Appeals for the Third Circuit.

REASONS FOR GRANTING THE WRIT

The Circuit Court's Holding That the Trial Judge's Action in Refusing to Resentence the Petitioners Was Not an Abuse of Discretion is Inconsistent With Settled Principles of Due Process of Law.

The Circuit Court has ruled that, on the facts here presented, the trial judge's action in refusing to resentence the Petitioners was not an abuse of discretion. Petitioners respectfully submit that the instant holding seriously undermines the constitutional mandate that every phase of a criminal trial—including the sentencing procedure—must conform with the requirement of due process. Moreover, the Circuit Court holding is inconsistent with this Court's ruling in *Townsend* v. *Burke,* 334 U.S. 736 (1948).

In order to insure the integrity of the sentencing process, other courts have invalidated sentences when there existed a possibility that the sentences were imposed on the basis of false information or false assumptions concerning the defendant. E.g., *United States* v. *Stein,* 544 F.2d 96 (2nd Cir. 1976); *United States* v. *Powell,* 487 F.2d 325 (4th Cir. 1973); *Collins* v. *Buchkoe,* 493 F.2d 343 (6th Cir. 1974). In *Townsend, supra,* this Court held such an error to be one of constitutional dimension.

In the instant case, the government had leveled grave charges of criminal misconduct against the Petitioners during an *in camera* proceeding before the trial judge. Petitioners first became aware of this event more than two years later during the presentation of their motions for reduction of sentence in May of 1977. The government's unsubstantiated allegations included bribery, blackmail, intimidation and subornation of perjury. Because this com-

munication was made *ex parte*, Petitioners, by their counsel, could neither rebut the allegations nor lessen their highly prejudicial and inflammatory impact upon the trial judge.

In *Townsend, supra*, this Court held that a defendant, unrepresented by counsel and thereby deprived of the opportunity to correct misinformation supplied to the trial judge in regard to sentencing, was denied due process of law. In the instant case, defense counsel was wholly unaware of a damaging confidential communication between the government and the trial judge until long after the conclusion of the trial. These circumstances rendered the availability of counsel totally meaningless. Consequently, as a practical matter, Petitioners were in the same helpless position as the uncounseled defendant in *Townsend* and were similarly denied due process of law.

As urged in the court below, because petitioners were deprived of an opportunity to rebut the government's unsupported allegations prior to the imposition of sentence, they are entitled to resentencing before another judge. *United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973); *United States* v. *Robin*, 545 F.2d 775 (2d Cir. 1976). It is of no consequence that the *ex parte* communication was not formally part of the "sentencing process." Federal courts have applied the rule requiring resentencing even when the unanswered *ex parte* communication occurred in a context wholly apart from the sentencing process as long as they occurred, as here, prior to sentencing. *United States* v. *Solomon*, 422 F.2d 1110 (7th Cir. 1970); *United States* v. *Latimer*, 415 F.2d 1288 (6th Cir. 1969).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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Of Counsel

December 16, 1977

APPENDIX

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 77-1751, 77-1752, 77-1753, 77-1761 & 77-1762

UNITED STATES OF AMERICA

v.

NORMAN DANSKER
JOSEPH DIACO
STEVEN HAMES
WARNER NORTON
DONALD ORENSTEIN
NATHAN L. SEROTA
ANDREW VALENTINE
INVESTORS FUNDING CORPORATION OF NEW YORK
VALENTINE ELECTRIC COMPANY

NORMAN DANSKER,
Appellant in No. 77-1751

STEVEN HAYMES,
Appellant in No. 77-1752

DONALD ORENSTEIN,
Appellant in No. 77-1753

JOSEPH DIACO,
Appellant in No. 77-1761

ANDREW VALENTINE and VALENTINE ELECTRIC CO.,
Appellants in No. 77-1762

(D.C. Crim. No. 74-555)

Appendix A

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued September 7, 1977

Before:

ADAMS, VAN DUSEN and HUNTER,
Circuit Judges.

Gerald L. Shargel, Esq., Fischetti & Shargel,
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Attorneys for Appellant Orenstein

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Attorney for Appellant Diaco

Edward Gasthalter, Esq., Hoffman Pollok
Mass & Gasthalter,
New York City, New York,
Attorneys for Appellants Valentine and
Valentine Electric Company

Jonathan L. Goldstein, U.S. Attorney;
John J. Barry, Chief, Appeals Division;
Newark, New Jersey,
Attorneys for Appellee

OPINION OF THE COURT
(Filed October 21, 1977)

Appendix A

VAN DUSEN, *Circuit Judge.*

Appellants stand convicted of violating 18 U.S.C. § 1952, including bribing the Mayor of Fort Lee, New Jersey.[1] On direct appeal, appellants raised for the first time claims that the prosecution had withheld exculpatory information in violation of the rule of *Brady* v. *Maryland*, 383 U.S. 83 (1963). This court at that time refrained from resolving the *Brady* claims, remitting the defendants to move in the first instance for a new trial before the trial judge.[2] The case is now before this court on appeal from a June 3, 1977, order denying appellants' Motions For A New Trial and An Evidentiary Hearing and Discovery In Support

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[1] The factual background of defendants' convictions is set forth in *United States* v. *Dansker*, 537 F.2d 40 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977), where the issues on direct appeal from the jury's verdicts of guilty were decided in a thorough opinion by Chief Judge Seitz.

[2] Part C of this court's opinion in *United States* v. *Dansker*, *supra*, concluded with this language at 537 F.2d 65:

"The defendants' allegations concerning Silver, if true, are relevant to the establishment of cause for a new trial. As such, they should be first presented to the district court on an appropriate Rule 33, Fed. R. Crim. Proc., motion. Of course, our decision in this response is without prejudice to any action which the defendants may wish to take in the district court. And, since we decline to pass on this matter, we express no opinion on the merits of defendants' *Brady* claim. *United States* v. *McCrane*, 527 F.2d 906, 914 (3d Cir. 1975).

"We have considered all other contentions raised by the defendants and find them without merit.[15]

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[15] "These contentions include the government's alleged *Brady* violation in refusing to disclose, prior to trial, any testimony of Sutton that was the basis for the second indictment in this prosecution which contradicted the allegations contained in the third indictment."

of the Motions.[3] These appeals also challenge the trial judge's denial of motions for his disqualification and discovery and for resentencing.[4] We reverse the district court order in part and remand for further proceedings consistent with this opinion.

In *United States* v. *Agurs*, 427 U.S. 97 (1976), the Court discussed the application of the *Brady* rule to three different situations of prosecutorial non-disclosure of exculpatory information—where the information revealed that the prosecution countenanced perjured testimony, where the defense specifically requested the relevant evidence and where the defense made either a general request or none at all for exculpatory information. For each situation the Court prescribed a different standard of materiality giving rise to a duty of disclosure. *See also United States* v. *McCrane*, 547 F.2d 204 (3d Cir. 1976). Appellants' allegations of undisclosed evidence comprise two separate sets of information—the so-called James Silver information and the so-called Anthony Carmanati information. This court has carefully tested both sets of allegations against the *Agurs* standards of materiality and accordingly resolves them differently.

The conflicting alleged statements of Silver to the prosecutor dictated the need for an evidentiary hearing in order to determine if some exculpatory evidence related to the bribery scheme might have been developed at trial. Silver accuses Arthur Sutton, the principal prosecution witness and an undisputed co-conspirator in the bribery

[3] The IFC defendants' motions are reproduced at pages 49a-53a of the appellants' joint appendix. The other defendants incorporated the IFC motions in their own motions for new trial.

[4] Judge Lacey's lengthy opinion accompanying his order denying all the motions appears at pages 1156a-1247a of the joint appendix.

scheme, of committing perjury[5] and he attributes to Sutton remarks seriously undermining his credibility.[6] Taking the Silver allegations as a whole, we have concluded that the trial judge erred in holding, without an evidentiary hearing, that there was no "reasonable likelihood" that the information would have affected the verdict, *United States* v. *Agurs*, 427 U.S. at 103.[6a]

However, considerable uncertainty surrounds the matter of just which allegations Silver communicated to the prosecution. The submitted record of written affidavits and documents is less than clear on this score. Prosecution affidavits, for example, deny pre-trial receipt of several of Silver's most telling allegations. *See, e.g.*, affidavit of Bruce I. Goldstein at 563a-566a of the joint appendix. Thus, relevant facts surrounding the Silver allegations and their communication to the prosecution remained in dispute on the written record before the trial judge. In addition, Silver's own trustworthiness and credibility have been implicated by the conflicting affidavits and other evidence. Where the submission of written affidavits raises

[5] Silver's statements controvert Sutton's denials of ever having participated in prior bribery schemes and his denial that Tony Comras was involved in the scheme to bribe Mayor Ross.

[6] Silver alleges Sutton had a long and checkered association with organized crime. More specifically, Silver imputes to Sutton an intention to "screw" one of the co-defendants, with whom he had portrayed himself as working in concert. Silver also alleges that Sutton had once threatened to kill Serota, who was paid off as part of the bribery scheme. In general, Silver casts Sutton as a ringleader in the bribery scheme rather than as an unwitting follower.

[6a] *Cf. Government of the Virgin Islands* v. *Toto*, 529 F.2d 278 (3d Cir. 1976) (jury verdict tainted by exposure to inadmissible testimony even where judge corrected error in his instructions; reversal warranted unless "it is highly probable that the error did not contribute to the judgment.").

genuine issues of material fact and where, as here, the *Brady* claims involving Silver are neither frivolous nor palpably incredible, an evidentiary hearing should be conducted.[7] See *Blackledge* v. *Allison*, 45 U.S.L.W. 4435 (May 2, 1977); *Lee* v. *United States*, 388 F.2d 737, 742 (9th Cir. 1968) (Stephens, J., concurring); 8A Moore's Federal Practice Par. 33.03[3] at 33-18 (2d ed. 1977).[8]

The trial judge denied appellants' request for an evidentiary hearing in part because some of the defendants "deliberately determined not to reveal to the court at the time of trial" their knowledge of Silver. *See United States* v. *Dansker*, Opinion dated June 2, 1977 (Crim. No. 74-555, D. N.J.), reproduced at 1209a. Such a conclusion is not sufficiently supported by the present incomplete written record and must be reevaluated by the trial judge after the evidentiary hearing.

The written record reveals that former counsel for defendant Dansker interviewed James Silver, in the presence of their client, during and immediately after the trial in March 1975, but have been uncooperative in discussing with present counsel exactly what Silver told them during

[7] One defendant, Joseph Diaco, is not entitled to an evidentiary hearing. The Silver information cannot exculpate Diaco even under the broad *Agurs* standard of materiality for reliance on perjured testimony. The Mayor of Fort Lee testified to receiving the bribe money from Diaco and the transaction was corroborated by tape recording. Thus, evidence of Diaco's guilt was overwhelming without any testimony by Sutton. There was no reasonable likelihood that the Silver evidence would have affected the jury's verdict of guilty.

[8] Whether applying the standards of a Rule 33 motion for new trial on the basis of after-discovered evidence or the standard of 28 U.S.C. Sec. 2255, as suggested by the parties, an evidentiary hearing is required to determine whether a new trial should be granted on the basis of the non-disclosed Silver information.

their interviews. At the evidentiary hearing, Dansker's former attorneys should be subject to compulsory process for examination as to the information Silver communicated to them during the trial and the attorneys' reasons for not utilizing this information both on cross-examination of Sutton and as a basis for calling Silver as a witness at trial. Moreover, trial counsel for the other IFC defendants, Haymes and Orenstein, were informed of the Silver interviews during the trial[8a] and such counsel participated in the post-trial interview of Silver. Thus, trial counsel for each IFC defendant may be examined, particularly on their reasons for not informing the trial judge of Silver's existence during the trial and, at least, at the time of filing their post-trial motions for judgment of acquittal and for a new trial.[9] Alleged exculpatory information which becomes known to the defense at a time it could have been acted upon may cure prosecutorial non-disclosure in certain circumstances. *See Brown* v. *United States*, 556 F.2d 224 (3d Cir. 1977); *United States* v. *Kaplan*, 554 F.2d 577 (3d Cir. 1977); *United States* v. *Harris*, 498 F.2d 1164 (3d Cir.), *cert. denied*, 419 U.S. 1069 (1974). The evidentiary hear-

[8a] See paragraph 4 of the affidavit of Judge Bauman, counsel for Dansker (573A). Mr. Levin, counsel for Orenstein, stated to the trial judge that he was informed by his client on March 23, 1975,

> ". . . that a man named James Silver had communicated with Mr. Dansker and that Judge Bauman was interviewing him at his home at that date. That was a Sunday.
>
> "I spoke later that night and the following day with Foster Wollen, a partner of Mr. Bauman's, who advised me of the interview with Mr. Silver." (858A)

[9] The verdicts of guilty against all appellants were handed down March 28, 1975. Post-trial motions were argued on or about April 28, 1975, decided by an opinion filed May 9, 1975, and denied by order not filed until June 3, 1975.

ing may reveal when, if at all, individual counsel and their clients learned about Silver's information and why they failed promptly to apprise the trial court of such information. Only after testimony on such matters has been heard can it be determined whether the prosecution's failure to disclose the Silver information was cured by defendants' acquisition of the information and subsequent inaction by their counsel.[10]

Under these circumstances, we believe that the district court should have made available to defense counsel compulsory process for production of Mr. Silver and the following witnesses, as well as an evidentiary hearing for the relevant admissible testimony of such witnesses:[10a]

Jonathan Goldstein
Bruce Goldstein
Arthur Goldstein
Richard Shapiro
Arnold Bauman

[10] For now we withhold judgment as to the extent of defense foreknowledge and inaction concerning Silver necessary to excuse prosecutorial non-disclosure of exculpatory information. We note only that prosecutorial suppression of exculpatory evidence denies defendants due process of law, *Brady* v. *Maryland*, 373 U.S. 83, 86-88 (1963), and that "where strategic and tactical decisions . . . by a counseled accused" are not involved (*see Estelle* v. *Williams*, 425 U.S. 501, 508 (1976), at note 3), fundamental constitutional rights are presumed not waived unless knowingly and intentionally relinquished by the defendant. *See Brewer* v. *Williams*, 97 S.Ct. 1232, 1242 (1977); *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938).

[10a] We leave to the sound discretion of the district court the witnesses and evidence which should be permitted at the evidentiary hearing which is contemplated by this opinion and make clear that the witnesses listed here are not the only witnesses who may be called if the district court decides, in its discretion after considering the contentions of counsel, that other witnesses should testify.

Foster Wollen
Clyde Szuch

The motions for new trial of all appellants, except Joseph Diaco, *see* note 7, *supra*, should not be determined until after this evidentiary hearing.

We have pointed out in *United States* v. *McCrane*, 527 F.2d 906, 911 (3d Cir. 1975), *vacated*, 427 U.S. 909 (1976) (remanded for further consideration in light of *United States* v. *Agurs*, 427 U.S. 97 (1976)), that all impeaching material need not be disclosed under *Brady*.[11] There is nothing in *Agurs* or *United States* v. *McCrane*, 547 F.2d 204 (3d Cir. 1976), contrary to this rule. Appellants allege that wiretapped conversations of Anthony Carmanati, a reputed leading underworld figure subject to an undercover investigation by the State of New Jersey, reveal that Carmanati was closely associated with Arthur Sutton and that the latter may have been "a financial backer" of Carmanati's activities. At trial, on direct and cross-examination, Sutton testified to having received an usurious loan from a "Tony C.," whom he failed to name more fully and who was the head of the maintenance company for Sutton's office building. Defendants, with due diligence, could have ascertained at the time of trial the identity of

[11] In *Weatherford* v. *Bursey*, 429 U.S. 545 (1977), the Court pointed out at page 559:

> "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one; as the Court wrote recently, 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . .' *Wardius* v. *Oregon*, 412 U.S. 470, 474 (1973)."

this Tony C. as Anthony Carmanati.[11a] *See United States* v. *Meyers*, 484 F.2d 113, 116 (3d Cir. 1973). Thus, the merit of the *Brady* claim based on wiretap recordings allegedly made available to the prosecution rests on any non-cumulative impact that Tony Carmanati's assertions might have had on Sutton's credibility.[12] We find that these assertions of a close association with Arthur Sutton merely confirm a relationship, unrelated to the bribery scheme, which defendants could have discovered with due diligence. While the tape recordings represent direct testimony of Carmanati, they are at most cumulative in their impact on Sutton's credibility. We conclude, therefore, that the district court's evidentiary hearing need not delve into the Carmanati set of information.

We have carefully reviewed all other motions[13] and contentions made by the appellants, including those for disqualification and discovery of the trial judge and for resentencing, and find them without merit. Accordingly, we hold that the trial judge's action in refusing to recuse

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[11a] Checks from Carmanati's 803 Building & Maintenance Co. were made available to the defense prior to trial (N.T. 2080-2091 & 2188), and defense counsel issued no subpoenas for other records of that company. See *Estelle* v. *Williams*, 425 U.S. at 508, note 3, cited above in note 10 of this opinion.

[12] In contrast to the Silver allegations, Carmanati's statements do not refer directly to the bribery scheme; nor do they imply that the prosecution relied on perjurious testimony. The Carmanati information bears only on the credibility of Sutton as a man financially associated with organized crime.

[13] These motions include the following:

Motion for disqualification and discovery filed by the IFC defendants (1041a)

Motion for new trial by defendant Diaco (1111a)

Motion for new trial by Andrew Valentine and Valentine Electric Company (1128a)

himself or to resentence the defendants was not an abuse of discretion. The June 3, 1977, district court order entered in *United States* v. *Diaco* (D. N.J. Crim. No. 74-555, and challenged in our No. 77-1761) will be affirmed. That district court order will be reversed as to the defendant-appellants Dansker, Haymes, Orenstein, Valentine and the Valentine Electric Company (our Nos. 77-1751/2/3 and 77-1762), and the case remanded to the district court for further action consistent with this opinion. This court's September 7, 1977, order will be vacated insofar as it extends Diaco's bail.

Judge Adams joins in this opinion except that he would grant an evidentiary hearing to determine whether the prosecution suppressed exculpatory evidence concerning Arthur Sutton's association with Anthony Carmanati and, if so, whether such suppression requires a new trial as to certain of the defendants.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit.